FILE COPY

Office Supreme Court, U.S.
FILED
FEB 29 1960
JAMES R. BROWNING, Clerk

No. ~~748~~ 45

In the Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL POWER COMMISSION, PETITIONER

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND THE CITY OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
ANTHONY L. MONDELLO,
Attorneys,
Department of Justice, Washington 25, D.C.

WILLARD W. GATCHELL,
General Counsel,
HOWARD S. WAHRENBROCK,
Solicitor,
ROBERT L. RUSSELL,
Assistant General Counsel,
DAVID J. BARDIN,
Attorney,
Federal Power Commission, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	5
Reasons for granting the writ	8
Conclusion	27
Appendix	28

CITATIONS

Cases:

Atlantic Refining Co. v. *Public Service Commission*, 360 U.S. 378	13
Cabot Gas Corporation, Re, 16 PUR (NS) 443 (1936)	21
Charleston & W. C. Ry. v. *Federal Power Commission*, 234 F. 2d 62	19, 20
City of Pittsburgh v. *Federal Power Commission*, 237 F. 2d 741	12, 19
Colorado Interstate Gas Co. v. *Federal Power Commission*, 324 U.S. 581	12
El Paso Natural Gas Company, FPC Opinion No. 333, November 27, 1959, rehearing denied, January 26, 1960	22
Federal Power Commission v. *East Ohio Gas Company*, 338 U.S. 464	17
Federal Power Commission v. *Hope Natural Gas Company*, 320 U.S. 591	12, 15, 16
Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17	26

541483—60——1

Cases—Continued

	Page
Interstate Commerce Commission v. *Railway Labor Executives Association*, 315 U.S. 373	12
Kansas Pipe Line and Gas Co. and North Dakota Consumers Gas Company, 2 FPC 29 (1939)	18
National Broadcasting Company v. *United States*, 319 U.S. 190	12
National Coal Ass'n v. *Federal Power Commission*, 191 F. 2d 462	19, 20, 24, 26
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672	21
Securities and Exchange Commission v. *Chenery Corp.*, 332 U.S. 194	26
Sunray Mid-Continent Oil Co. v. *Federal Power Commission*, 353 U.S. 944	25, 26
United States v. *Detroit Navigation Co.*, 326 U.S. 236	10
United States v. *Lowden*, 308 U.S. 225	12

Statute:

Natural Gas Act, Act of June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w:	
Section 4(a)	16
Section 5(a)	16
Section 7	2, 5, 8, 12, 15, 16, 23
Section 7(c)	3, 17, 18, 19
Section 7(e)	4, 10, 13, 15
Section 11	16
Section 19(b)	2, 25

Miscellaneous:

Federal Power Commission order (1944) instituting Natural Gas Investigation, Docket No. G–580, 4 FPC 725–727	23

Miscellaneous—Continued

	Page
Federal Power Commission, Report of Commissioners Olds and Draper on the Natural Gas Investigation (1948), F.P.C. Docket No. G–580	13
Federal Power Commission's Twenty-Sixth Annual Report (1946), 66–69	23
Hearings before the Committee on Interstate and Foreign Commerce, on H.R. 5249, House of Representatives, 77th Cong., 1st Sess., p. 5	18
Hearings before a subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 734, 80th Cong., 1st Sess. 60	20
H. Rep. No. 1290, 77th Cong., 1st Sess	19
Senate Joint Resolution 92, 78th Cong., 2d Sess	23
S. Rep. No. 1234, 78th Cong., 2d Sess.:	
p. 2	23
pp. 3–6	23–24
p. 6	24

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. ——

FEDERAL POWER COMMISSION, PETITIONER

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND THE CITY OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above cases on November 3, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 28–49) is reported at 271 F. 2d 942. The orders of the Federal Power Commission denying the certificate application (R. 174a–183a) and denying rehearing (R. 184a–194a) are reported at 21 FPC 138 and 21 FPC 399.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1959 (App., *infra*, pp. 49–50). By

order of Mr. Justice Brennan dated January 27, 1960, the time within which to file a petition for a writ of certiorari was extended to and including March 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

A New York electric and steam utility contracted to buy natural gas in the field in Texas for consumption under its own boilers in New York. Federal Power Commission approval of such transactions would not be required since no sale for resale is involved. The New York company arranged for transportation of the gas from the places of purchase in Texas to the point of consumption in New York. The transporting pipeline company then applied to the Federal Power Commission for a certificate of convenience and necessity, under Section 7 of the Natural Gas Act (15 U.S.C. 717f). In denying the certificate, the Commission considered the effect of this and future similar transactions on the price and availability of natural gas generally; it also considered the desirability of the particular end-use to which this gas would be put.

The question presented is whether the Commission had power, under Section 7, to consider these factors in this proceeding for a certificate to transport the gas through an interstate pipeline.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act are as follows:

Section 7(c), 56 Stat. 83, U.S.C. 717f(c):

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the pro-

cedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

Section 7(e), 56 Stat. 84, 15 U.S.C. 717f(e):

Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

STATEMENT

In a certificate proceeding brought under Section 7 of the Natural Gas Act, Transcontinental Gas Pipe Line Corporation (Transco) sought a certificate of public convenience and necessity to transport in interstate commerce, for Consolidated Edison Company of New York, Inc. (Con Edison), natural gas which Con Edison had contracted to buy from producers in Texas. Because the transportation was to be performed under a proposed Transco rate schedule "X–20", applicable to Con Edison alone, the arrangement has come to be known as the "X–20 service."

Con Edison had contracted to buy natural gas at 19¼ cents per Mcf in the Normanna and Sejita fields, in southern Texas, for use as boiler fuel at its Waterside steam-electric station in New York City. The gas-purchase contracts prohibit resale of the gas by Con Edison,[1] and therefore no Commission approval of the sales or purchases is required by the Natural Gas Act. Con Edison then arranged with

[1] Con Edison's Vice President testified that it acquiesced in the producers' insistence that the gas not be for resale because it wanted a firm supply, and this could not be assured under Transco's regular tariff (R. 30a). The tariff provision in question is paragraph 2(b) of Rate Schedule CD–3, under which Con Edison buys gas from Transco, and which permits curtailment of deliveries destined for use as boiler fuel when the gas is needed for use in Transco's underground storage facilities (R. 154a–155a). Paragraph 2(b) would not apply to the gas involved in the X–20 arrangement.

The reference "R. —" is to the pages of the Joint Appendix printed for use in the court below.

Transco for transportation of the gas at a rate of 50,000 Mcf daily to New York City.[2]

At the certificate hearing,[3] Con Edison undertook to show that its proposed use of the gas was in the public interest as the only effective and economical means of reducing air pollution in the vicinity of its Waterside station, which is located near the United Nations building in New York City. The examiner regarded the evidence concerning pollution as most speculative, and found that the proponents had not sustained their burden (R. 171a, 172a). However, he held that the Commission had no legal basis for inquiry into the merits of the proposed end-use and approved the requested transportation service (R. 171a).

---

[2] The proponents testified that they planned shortly to increase X–20 transportation to 120,000 Mcf per day. Transco also undertook to sell from its own reserves, at Con Edison's option, and without restriction as to resale, up to 50,000 Mcf per day on up-to-60 days of the year, backing off the transportation service to obtain pipeline capacity to deliver its own gas. Con Edison presented testimony that it would exercise that option only in part, and that it planned to burn as boiler fuel on every day of the year at least 25,000 Mcf of the gas it had purchased in the field (R. 7a, 29a, 98a). Although, under the X–20 arrangement, Con Edison would have the right to buy up to 3,000,000 Mcf a year from Transco for resale, the estimate presented to the Commission by Transco was for actual purchases of only 912,500 Mcf (R. 123a, line 10).

[3] The Commission permitted intervention by Con Edison and the City of New York (which supported Transco's application), by the "coal interests" (National Coal Association, United Mine Workers of America, and Fuels Research Council, Inc., which opposed the application), and by the New York Public Service Commission (which remained mute as to the X–20 proposal), among others.

The Commission noted the attractiveness of the idea of ameliorating the unpleasant air pollution both around the United Nations building, and generally in New York City (R. 178a, 191a–192a). It concluded, nevertheless, that weightier considerations compelled the denial of the grant, and in denying rehearing pointed to various possible adverse effects of the proposal. Included among these were (R. 185a):

> the effect of stimulating increased purchases of gas in the field by distributing companies in substitution for the present, prevalent types of interstate natural-gas service involving purchases and resales by natural-gas pipeline companies; the effect of pre-empting pipeline capacity which would otherwise be available for more widely beneficial public service; the effect of making it more difficult to meet the requirements of smaller purchasers in the event arrangements of this type become wide-spread; and the effect of increasing the rates for gas, to the detriment of the consumer. We also considered the proposed inferior end use of the gas. * * *

Weighing these factors against the desirability of alleviating air pollution, and the conventional elements of public convenience and necessity, the Commission found the proposal not in the public interest, and denied the application.

The Court of Appeals set aside the Commission's order denying Transco's application, on the basis that the Commission had exceeded its jurisdiction by even considering the end-use to which the gas would be put.

It read in the Commission's "examination and disapproval of the end use to be made of this gas," an assertion of "a general allocation and conservation authority over the natural gas fields of the United States" (App., *infra*, p. 33). It found from an examination of legislative materials that the Commission had requested such general conservation authority from Congress and was not granted it in the Natural Gas Act or its amendments. The court commented directly on each of the critical policy considerations which persuaded the Commission, on balance with other factors, to deny the application. It found two of these considerations—*ie.*, preemption of capacity, and effect on price—to be implicit assertions of general conservation authority. Without characterizing the Commission's consideration of the small gas consumer's inability to bid competitively with large purchasers in the gas fields, the court found this also to be a consideration "which the Congress did not envisage" (App., *infra*, p. 47).

The court directed that the Commission grant the certificate, permitting it first to conduct hearings on a minor, disputed, factual matter.

REASONS FOR GRANTING THE WRIT

In legal terms, this case concerns the scope and extent of the Federal Power Commission's authority to inquire into the "present or future public convenience and necessity" in issuing certificates for interstate gas transportation under Section 7 of the Natural Gas Act, where the Commission has no direct authority under the Act over the sale of the gas in the field

or its end-use at the point of consumption. The court below has confined the Commission's power of scrutiny in these circumstances very narrowly—contrary to the teachings of this Court's decisions, the consistent understanding of the Commission for many years, the pertinent legislative history, and recent rulings of the District of Columbia Circuit. For these reasons, the case fully deserves review here.

In practical terms, moreover, the decision below bears within itself very serious consequences for the proper administration of the Natural Gas Act. It would permit a vast, new, unregulated, interstate market for gas—by industrial enterprises purchasing for their own use—side by side and competing with the regulated market over which the Commission currently exercises jurisdiction. This new market (1) would probably have definite and lasting inflationary impact on gas prices generally, (2) could well be devoted to end-uses inappropriate to the broad purposes of the Natural Gas Act, (3) would disrupt patterns of industry growth evolved from 20 years of congressionally-directed regulation, and (4) would probably be beyond effective state regulation. If the ruling below is permitted to stand, the attractiveness of this unregulated market, especially to gas producers, will undoubtedly foster transactions comparable to that between the producers in this case, Transco (the pipeline), and Con Edison (the industrial purchaser). The basic problem of the permissible range of Commission inquiry and decision will thus be recurrent, and in view of the issue's considerable public importance it deserves early review by this

Court. The need for an authoritative ruling is underscored by the Court of Appeals' statement that "[w]e have no decided court case to give us a precedent or guidance in the matter here under discussion" (App., *infra*, p. 42).[4]

1. The scope of Commission inquiry in all certificate cases is, and must be, broad. Section 7(e) of the Natural Gas Act (*supra*, p. 4) demands that the Commission find, before issuing a certificate, that it "is or will be required by the present or future public convenience and necessity". This Court has described the administrative function in granting certificates under that standard as

> * * * not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment *and to determine from its analysis of the total situation* on which side of the controversy the public interest lies * * * [*United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241]. [Emphasis added.]

The court below, in its insistence that the Commission could properly consider solely the "conventional requirements" for granting or denying a certificate,

[4] The need for resolution by this Court of the problem posed by this case is also emphasized by the fact that, if this Court does not grant certiorari, any Delaware or Pennsylvania corporation can take advantage of the decision of the Third Circuit. The possibility of avoiding conflict between circuits will thus be subjected to control by the industry if industrial gas consumers wishing to follow the practice in this case choose to deal only with such pipelines. Approximately 50% of the natural gas companies subject to Commission jurisdiction (not including independent producers) are incorporated within the Third Circuit.

would permit consideration not of the "total situation", but merely of those narrow requirements which relate to the particular applicant's ability to perform the proposed service. These limited factors—of technical and economic feasibility of the proposal, adequacy of a gas supply to the applicant, existence of a market for the gas, and the rates to be charged for its transportation—essentially measure little more than whether the proposal is fair to Transco, its investors, and Con Edison. While the stability of the venture in these terms is important to the public interest, it certainly does not exhaust that interest.

In certificate cases the Commission's judgment must be brought to bear on its analysis of the "total situation" in determining both the present and the future public needs, and all of those needs which are relevant. In narrowly reading the Act's broad standard to exclude any factor not directly related to the *present transportation* of the gas, the court below permits consideration only of one segment of the public's interest and only of *present* interests. Yet this Court, in *Detroit Navigation*, stressed that under this standard

> * * * Forecasts as to the future are necessary to the decision. * * * It may be that the public interest requires that future * * * needs be assured rather than left uncertain. The Commission has the discretion so to decide * * * [326 U.S. 236, 241].[8]

[8] "The public convenience and necessity for which regulatory agencies issue certificates are the convenience and necessity of the future. The needs of yesterday require no fulfillment if they be not the needs of tomorrow. They may require recompense, but they need no regulation. Every new bus route, new

Unless Congress has provided otherwise,* the range of Commission inquiry can properly include areas within the industry which the Commission cannot directly regulate. See *National Broadcasting Company* v. *United States*, 319 U.S. 190, 215–220; *Interstate Commerce Commission* v. *Railway Labor Executives Association*, 315 U.S. 373; *United States* v. *Lowden*, 308 U.S. 225; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 660 (dissent of Jackson J.). This general principle has already been applied by the Court to this Commission and to the Gas Act. In *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 602–603, 604, a rate case, the contention had been raised, on the assumption that the statute's terms precluded Commission control over production and gathering, that it was improper for the Commission to include such facilities in a natural gas company's rate base, and improper to determine the expenses incident to such facilities for the purpose of determining the reasonableness of the company's rates. This Court rejected that contention, concluding that the Commission was not prevented from taking these matters into account. Simi-

---

airplane service, new radio station, new stock issue, new pipe line, new power project, and so on, seeks its permissive certificate upon the basis of future possibilities. * * * So the function of the agencies to which Congress has delegated these responsibilities is to examine the relevant past and present and then to exercise a rational judgment upon that data to ascertain the public convenience and necessity in the reasonably foreseeable future." *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 752 (C.A.D.C.).

*It is clear from the grant of power in the original Section 7 and in the 1942 amendment (*infra*, pp. 15 *ff*) that Congress has not done so here.

larly, it should be able to take into account the economic realities peculiar to the natural gas industry which bear here on the public interest in issuing or denying a certificate. The affirmative duty of the Commission not to blind itself to relevant considerations was most recently emphasized by this Court's statement in *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 391, that "Section 7(e) requires the Commission to evaluate *all* factors bearing on the public interest" (emphasis added).

2. The price consequences, the availability, and the end-use of natural gas resulting from the proposed transaction are clearly factors bearing on the public interest. Indeed, denial of Tranco's application could have been predicated upon price considerations alone. In treating of price in its initial order, the Commission regarded raised prices in the future, as a result of authorizing this proposal, to be "certain" and not merely likely. The facts of the natural gas business fully support this Commission judgment. For it is clear that many gas producers prefer to remain unregulated.[7] There is nothing illegal in this preference. The Court pointed out in the *Atlantic Refining* case

[7] See Petition of Phillips Petroleum for Rehearing of Order Denying Petition for Writ of Certiorari in No. 280, October Term, 1958, at pages 5–7; and the suggestion of Con Edison's witness that the reason the producers here insisted that Con Edison consume the gas and not resell it is that they were "allergic" to proceedings before the Commission (R. 108a).

In their Report on the Natural Gas Investigation (1948, p. 12), Commissioners Olds and Draper noted "* * * the voluble insistence by representatives of the industry on their desire for a virtually unregulated market for natural gas at virtually unregulated prices * * *."

(360 U.S. 378, at 388) that a producer can initially refuse to sell gas to any one except on his own terms; and no one has a legal complaint under the Gas Act if a producer chooses to sell in a regulated or an unregulated market, or prefers to leave his gas in the ground. If the decision of the court below stands, purchases of this kind by industrial consumers from producers in the field—purchases unregulated as to price—will be sharply encouraged and rises in price are almost inevitable because of the competing bids of these industrial purchasers.*

This is the point of the matter, and the crux of the Commission's concern in this case for the public interest—the propensity of unregulated sales to drive up the price of gas. Congress would hardly have intended the Commission to exercise its certificate jurisdiction in such fashion as to permit, through the use of regulated interstate facilities, the creation of a new interstate unregulated market which would have a devastating influence on prices in the interstate regulated market. And the fact that Congress did not empower the Commission to regulate *intrastate* sales is no basis for arguing that it intended the creation of an additional, *interstate,* unregulated market. There are obvious geographical limits on the extension of intrastate sales which sufficiently limit their possible impact on federally-regulated transactions. It is incompatible with the Congressional design to protect

*For a graphic statement of this problem, from the viewpoint of local gas distributing companies, see the Brief *Amicus Curiae* of the Southern California Gas Company and Southern Counties Gas Company of California, in support of this petition.

natural gas consumers from exploitation, which this Court has noted as the prime motivation of the Act,[9] to permit this use of regulated facilities to undermine the very scheme of regulation which Congress devised. As we have pointed out (*supra*, pp. 10–13), Congress granted ample power in the terms of Section 7(e) for the Commission to consider fully the public interest involved in applications to transport natural gas through regulated interstate facilities. The curtailment of that power by the court below merits this Court's review.

3. The Court of Appeals also erred in its ruling that the Commission could not consider conservation or end-use factors.[10] In this connection, the court misinterpreted the 1942 amendment of Section 7 of the

[9] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610.

[10] The Court of Appeals' insistence that conservation not be considered becomes all-inclusive when it equates the relatively independent factor of price with conservation. The necessary result of this equivalence is that, aside from "conventional requirements," nothing more can be considered in the certificate proceeding since everything else is "conservation." Any grant or denial of a certificate on *any* basis will have *some* effect on conservation to the extent that it either fosters the production of gas, or fosters leaving it in the ground. In this sense, the approval of rates by the Commission, and indeed the setting of unregulated prices by producers, have an effect on conservation. The incentive for taking natural gas out of the ground is to sell it for use. While this process can be regarded in separate phases, such as production, transportation, distribution and consumption, as a practical matter these are closely interrelated steps in a single process. It should not be surprising that affecting one step will have impact on other stages in the process. But the fact that relationships of this kind exist does not permit fusing with conservation the independent factors the Commission also considered.

Gas Act and paid too little heed to this Court's statement of the meaning of the 1942 modification in the statute. The court also misread certain legislative and Commission materials as meaning that Congress had granted *no* power at all to the Commission to consider end-use, when the most these materials show is that Congress did not grant the Commission comprehensive and direct power over the conservation and allocation of natural gas, both in its end-use and in the gas fields.[11]

(*a*). In *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, this Court refused to require the Commission to effect end-use conservation objectives in exercising its jurisdiction under Sections 4(a) and 5(a) of the Act to regulate *rates*.[12] But with respect to *certificate* cases, the Court stated (*Id.* at 612):

> * * * [W]e may assume that, apart from the express exemptions contained in § 7, considerations of conservation are material to the issuance of certificates of public convenience and necessity.

The Court also said (*Id.* at 616–617):

> * * * The Act of February 7, 1942, by broadening § 7 gave the Commission some additional au-

[11] Section 11 of the Act, 15 U.S.C. 717j, essentially leaves field conservation to the states, and contemplates state compacts, aided by Commission-obtained information, to facilitate this purpose.

[12] Justices Frankfurter and Jackson dissented. They would have read the "just and reasonable" rate standard as embracing conservation considerations. 320 U.S. at 624, 628.

thority to deal with the conservation aspects of the problem."[30] * * *

[30] The Commission has been alert to the problems of conservation in its administration of the Act. It has indeed suggested that it might be wise to restrict the use of natural gas "by functions rather than by areas." Annual Report (1940) p. 79.

The Commission stated in that connection that natural gas was particularly adapted to certain industrial uses. But it added that *the general use of such gas "under boilers for the production of steam" is "under most circumstances of very questionable social economy."* *Ibid.* [Emphasis added.]

Subsequently, in *Federal Power Commission* v. *East Ohio Gas Company,* 338 U.S. 464, 468–469, the Court confirmed its interpretation of the 1942 amendment, as follows:

> Moreover, the initial interest of Congress in regulation of transportation facilities was reemphasized in 1942 by passage of an amendment to § 7(c) of the Act broadening the Commission's powers over the construction or extension of pipe lines. 56 Stat. 83. This amendment followed a report of the Commission to Congress pointing out that without amendment the Act vested the Commission with inadequate power to make "any serious effort to control the unplanned construction of natural-gas pipe lines with a view to conserving one of the country's valuable but exhaustible energy resources." [The Court's footnote is omitted.]

(*b*). This interpretation of the 1942 amendment is fully supported, at least as to end-use conservation through the consideration of competing fuels, by the

legislative history of the Act. Prior to the 1942 amendment, Section 7(c) limited the Commission's jurisdiction over the proposed construction of facilities to those which would transport gas to a market in which natural gas was already being served by another natural gas company. In view of this limitation, the Commission was of the view that it should consider only competition between natural gas companies, and that Congress did not intend that it should generally weigh the broad social and economic effects of the use of various competing fuels. *Kansas Pipe Line and Gas Co. and North Dakota Consumers Gas Company,* 2 F.P.C. 29, 57 (1939). During the hearings which led to the 1942 amendment, Commissioner Manly testified to the Commission's view that it should not permit full rights of intervention to coal, labor and railroad interests in its hearings, on the basis that Congress (in view of the limitation noted above) had not intended it to weigh the social and economic interests in competitive fuels and competitive methods of transportation.[13] Stressing the unsatisfactory administration of Section 7(c) which contained these limitations, the House report on the amendment stated:

> The bill, as amended, eliminates the objections to the present section 7(c) above mentioned. By this legislation * * * the door is opened to the consideration by the Commission of the effect of construction and extensions upon the interests of producers of competing fuels and competitive transportation

[13] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., 1st Sess., p. 5.

interests. [H. Rep. No. 1290, 77th Cong., 1st Sess., p. 3.]

Thus, Section 7(c), as amended (15 U.S.C. 717f(c)), broadened the Commission's jurisdiction over the construction and extension of pipeline facilities and empowered the Commission to consider in this connection the use of gas and competitive fuels, and competitive methods of transportation.

Any consideration of competition between fuels, or competition between methods of transportation, involves a judgment as to which fuel or method of transportation should be used in the circumstances of the particular case. This judgment as to use is what Congress entrusted to the Commission by the 1942 amendment. The fact that a certificated pipeline extension will displace the transportation of oil by river barges is the critical fact which gives the barge operators standing to challenge the grant of the certificate,[14] and it exposes the crucial fact that the use of one means of transportation, rather than another, may constitute the heart of the controversy which must be resolved.[15] Similarly, the displacement of coal by gas, and the resultant displacement of railroad transportation for the coal,[16] show that consideration of this competition and of which fuel shall be used are virtually indistinguishable. As the Court of Appeals for the District of

[14] See *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 746–748 (C.A.D.C.).

[15] *Ibid.*, pp. 753–754.

[16] *National Coal Ass'n* v. *Federal Power Commission*, 191 F. 2d 462, 466–467 (C.A.D.C.); *Charleston & W.C. Ry.* v. *Federal Power Commission*, 234 F. 2d 62 (C.A.D.C).

Columbia Circuit has noted, "[t]he corollary of [the Commission's] authority to allow intervention is the duty to explore all pertinent aspects of an intervenor's relationship to the matter under consideration",[17] including the desirability of burning gas under boilers when coal is readily and economically available, or preserving the less abundant premium fuel—gas—for superior uses.[18] It is difficult, in short, to see how the statutory authority to consider competition among fuels can rationally be divorced from consideration of the use to which the fuels are put.[19]

(*c*). The Commission's traditional concern with use considerations in certificate cases is thus reasonable, necessary, and responsive to Congressional direction. Its labeling as "inferior" the use of gas as boiler fuel simply recognizes the competition of a more abundant fuel—coal; and its attempts to limit inferior uses are compelled by the single most critical factor of present and future public interest in natural gas, namely, the exhaustability of its supply. The cases cited by the court below which show Commission implementation of its boiler fuel policy reflect no undiscriminating hostility to all industrial consumption

---

[17] *National Coal Ass'n* v. *Federal Power Commission*, 191 F. 2d at 466 (C.A.D.C.).

[18] *Charleston & W.C. Ry.* v. *Federal Power Commission*, 234 F. 2d at 64 (C.A.D.C.).

[19] When in 1947 a proposed bill would have precluded the Commission from denying a certificate because of end-use considerations, Chairman Smith of the Commission testified: "Just how public convenience and necessity could be determined without any consideration of the market and the nature of the demand for gas is hard to see." Hearings before a subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 734, 80th Cong., 1st Sess., 60. The bill died in Committee.

(App., *infra*, pp. 39–41). On the contrary, they show a careful selection of circumstances in which the public interest may require such consumption. The Commission has adopted a flexible, not a rigid, approach to the problem.[20]

[20] Industrial consumption on an interruptible basis, as a device for increasing the "load factor" in pipeline facilities, is a pattern of the industry. Such consumption in warm periods, when the demands of smaller domestic and commercial consumers are reduced, permits optimum year-round use of pipeline facilities, thereby making it possible to provide gas service to domestic consumers who would not otherwise be served, or to do so at lower unit costs than would otherwise be required. The benefits of this pattern would be lost to the extent that large industrial consumers cease buying from distributing companies, buying instead directly from producers in the field. The decision of the court below opens the door to the loss of these benefits.

Protection of these and other consumers from price and availability disadvantages of the X–20 type operation cannot be expected from the states. The interstate character of the transaction would prevent the *producing* states from exercising jurisdiction. See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682–685. The hopelessness of the position of the *consuming* state is demonstrated by the opinion of Chairman Maltbie of the New York Public Service Commission in a "boiler-fuel case". *Re Cabot Gas Corporation*, 16 PUR (NS) 443, 445–446 (1936):

> * * * Our natural gas resources ought to be conserved and there is probably no field where the Federal government acting in the interests of the entire country and to protect the welfare of the future could accomplish more than in the natural gas industry. From a conservation viewpoint, I thoroughly agree with Commissioner Burritt, and if I could see how a denial of the present petition would work to this end, I would vote to refuse the application; but will such denial produce the desired results?
>
> The field from which gas is to be taken by the petitioner is in northern Pennsylvania and southern New York. * * *

Moreover, each of these cases is a concrete instance of the Commission's belief that it has power to consider end-use. The Court of Appeals' reliance on a 1944 Commission report which it believes contains "the Commission's own concession of lack of such power" is incorrect (App., *infra*, p. 38). For one thing, the question of power can only be resolved by examination of what Congress intended to give, and not by what the Commission thought it had received. But if the latter inquiry is made, it reveals the Commission's belief that it had *some* power to deal with end-use conservation, but did not have full, specific and comprehensive power to deal directly with conservation. This understanding is explicit even in the portions of the reports of 1940 and 1944 quoted by the court below.[21]

It is possible for Pennsylvania companies to take all of the gas from this field unless the New York companies remove the gas before the field is exhausted. * * * If restriction is imposed on the use of it in New York, it may go to Pennsylvania * * *.

Thus, the state must either permit inferior use, or lose the gas entirely. In most cases, therefore, X-20 type proposals are beyond effective state regulation. Where effective state regulation can be applied to such a transaction, however, the Commission can condition the transportation certificate to permit it. This was recently done in *El Paso Natural Gas Company*, FPC Opinion No. 333, November 27, 1959, rehearing denied, January 26, 1960.

It is noteworthy that the New York Public Service Commission, an active party in other phases of the proceeding before the Commission, remained mute as to the X-20 proposal, expressing neither support nor opposition.

[21] Note the implications of "treat fully" (line 5, footnote 20); "broadened" (second from last line, footnote 20); "comprehensive powers" and "specific powers" (second and eighth lines, last paragraph, footnote 24); App., *infra*, pp. 37–38, 39.

The Commission in another report in 1944 made crystal clear its understanding of its power to consider end-use as a result of the 1942 amendment of Section 7. In that year, the Senate Committee on Interstate Commerce was concerned, in Senate Joint Resolution 92,[22] with the need for possible "further legislation to restrict unnecessary waste or depletion of natural-gas reserves or the utilization of natural gas for inferior or otherwise undesirable purposes in competition with other fuels." (S. Rep. No. 1234, 78th Cong., 2d Sess., p. 3.) The Committee recognized that

> "In administering the Natural Gas Act, particularly section 7(c) thereof, as amended, * * * the Commission is directly concerned with the problem of conservation of natural gas. [*Id.*, p. 2.]

Similarly, in its report to the Chairman of the Senate Committee on S.J. Res. 92 (*Id.*, pp. 3–6), the Commission noted the need for wise conservation practices in the production and use of natural gas if premature exhaustion of this great natural resource was to be avoided, and noted that "the work which the Commission *is doing* under [the Natural Gas Act] should be considered as a first step in dealing with the conservation of one of the country's exhaustible re-

[22] This resolution proposed a comprehensive study to be conducted by the Commission to secure for Congress information to guide it in further legislation for the conservation of natural gas. The need for directing such an investigation evaporated when the Commission issued its own order instituting the Natural Gas Investigation. 4 FPC 725–727. See also the Commission's Twenty-Sixth Annual Report (1946), pp. 66–69.

sources." *Id.*, p. 5 (emphasis added). Speaking of the 1942 amendment, the Commission's report stated

> The amendment to section 7 of the Natural Gas Act [in 1942] removed the statutory impediment to consideration by the Commission of the social and economic effects of the use of natural gas and competing fuels in certificate cases, which existed prior to the amendment; but the consideration of such interests in particular cases only makes more necessary a general investigation inquiring into the subject matter on a national basis such as that proposed by the joint resolution. [*Id.*, p. 6.]

4. We have noted (*supra*, pp. 19, 20) the decisions of the Court of Appeals for the District of Columbia Circuit which state that the Commission not only may, but must, consider end-use conservation where applicable in certificate cases. The court below (App., *infra*, p. 43) found no conflict with these decisions on the ground that the District of Columbia Circuit had merely found the Commission's end-use considerations "not controlling," whereas here the question was whether "such matters may be considered at all." But in the *National Coal* case the District of Columbia court squarely declared that the Commission "properly assessed great weight" to the public interest in the use of gas as boiler fuel in the Atomic Energy plant at Oak Ridge (191 F. 2d at 467). If that factor may not be considered at all, it would be error to ascribe to it any weight. The holding of the court

below thus conflicts, at least in principle, with the views of the District of Columbia Circuit."

5. The Court of Appeals also erred in remanding the case to the Commission "with directions to issue the certificate applied for" (App., *infra*, pp. 49, 50). Under the repeated and uniform decisions of this Court, the power of the reviewing court "to affirm, modify, or set aside" a Commission order "in whole or in part" (Natural Gas Act, Section 19(b), 15 U.S.C. 717r(b)) does not authorize it to exercise an essentially administrative function. Judicial review ends when an error of law is laid bare; the matter must then be returned to the agency for reconsideration. *Sunray Mid-Continent Oil Co.* v. *Federal Power*

---

[11] The Court of Appeals below commented unfavorably on the Commission's consideration of the use of gas for boiler fuel as an "inferior" and undesirable use in this case, and observed that the Commission had completely ignored the fact that the industrial boilers in question generated steam to be used for space-heating and lighting (App., *infra*, pp 48–49). However, this factor did not control the court's decision, and is irrelevant to the more important questions concerning consideration of end-use and of other factors which did control the decision of the Commission and that of the court. Moreover, no matter what use is made of the steam, the proper focus can only be on the competing fuels which fire the steam boilers, and their relative abundance, convenience, and efficiency for this purpose.

The court below concedes that "[i]f the Commission has authority to regulate end use as a part of a conservation plan it certainly has the authority to balance the factors in each individual case as its arises" (App., *infra*, p. 42); and in its brief discussion of the air pollution problem, it repeats that "the weighing of factors of this kind, if within the jurisdiction of a body, is a matter in which a reviewing tribunal will not interfere if a rational conclusion has been reached" (App., *infra*, p. 48).

Commission, 353 U.S. 944; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20–21; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196.

The Third Circuit regarded the Commission's consideration of end-use as the controlling determinant in its decision, despite the Commission's assertion in its order denying rehearing (21 FPC 399, 401) that:

> Contrary to applicants' contentions, we do not view the proposed end use of the gas involved in this case as of decisive importance. In accordance with the *National Coal Ass'n* case, it is but one factor, and that not of determinative importance, which we consider in the exercise of our judgment on all the facts.

Thus, aside from the Commission's employment of the end-use factor, we think the court below was bound to accept the Commission's judgment on the other considerations it took into account. And even if the court were correct in believing that Congress had precluded the Commission from considering end-use, the court's proper role would have been to remand the case to the Commission for reconsideration, with directions not to consider end-use. The ultimate determination of the public interest, in the light of the court's opinion and perhaps other factors which the Commission had earlier felt need not be weighed, would be for the Commission and not for the court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
ANTHONY L. MONDELLO,
Attorneys.

WILLARD W. GATCHELL,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
ROBERT L. RUSSELL,
Assistant General Counsel,
DAVID J. BARDIN,
Attorney,
Federal Power Commission.

FEBRUARY 1960.

APPENDIX

In the United States Court of Appeals for the Third Circuit

Nos. 12908, 12929 and 12930

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER IN No. 12908

THE CITY OF NEW YORK, PETITIONER IN No. 12929

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER IN No. 12930

v.

FEDERAL POWER COMMISSION, RESPONDENT

NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA, FUELS RESEARCH COUNCIL, INC., INTERVENORS

SOUTHERN CALIFORNIA GAS COMPANY AND SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, INTERVENORS

On Petition for Review of Orders of the Federal Power Commission

Argued September 25, 1959

Before GOODRICH, STALEY, and HASTIE, *Circuit Judges*

OPINION OF THE COURT

(Filed November 3, 1959)

By GOODRICH, *Circuit Judge:* We have before us three cases which were consolidated for argument.

The main case is a petition by Transcontinental Gas Pipe Line Corporation (Transco) to set aside an order of the Federal Power Commission which refused to issue it a certificate of public convenience and necessity. Another case is a petition by Consolidated Edison Company of New York, Inc. (Con Edison) seeking the same relief. The same is true of the petition brought by the City of New York. Joining with the Commission are intervenors National Coal Association, United Mine Workers of America and Fuels Research Council, Inc. Filing a brief also as amici curiae are Southern California Gas Company and Southern Counties Gas Company of California. For the opinion and order below see *Transcontinental Gas Pipe Line Corp.*, 21 F.P.C. 138, *rehearing denied* 21 F.P.C. 399 (1959).

The essential facts can be briefly stated. Con Edison went into Texas and made a contract with producers for the purchase of natural gas in the Texas field. Then it made an agreement with Transco providing for what is called "X-20 service." Transco agreed to transport the gas to New York and deliver it there to Con Edison. Included in the agreement was a provision for a sixty-day-a-year service which Transco agreed to render Con Edison from its own gas reserves and during the time this service was furnished the Con Edison supply from Texas would not be used. Con Edison agreed with the producers not to sell this gas at retail in New York. It is to be used to fire two of the ten boilers in Con Edison's Waterside plant near 42nd Street and East River in New York City. The City of New York is interested in the litigation because by the substitution of gas for coal, now being used to fire the boilers which Con Edison has at this plant, the very considerable amount of fly ash and the very considerable amount of sulfur dioxide poured

into the air in this densely populated portion of New York City will be greatly reduced.

In the opinion and order denying the certificate the Commission agreed that the "conventional requirements" of public convenience and necessity had been satisfied by the showing made.[1] The matter of markets, facilities, gas supply and rates[2] are included in these "conventional requirements." The Commission, however, overruling its presiding examiner, denied the certificate and gave five policy reasons for doing so. Since the soundness of these reasons is the heart of the controversy, we set them out in full in the Commission's language. Here they are:

> 1. "Certainly, if we were to grant this request we would soon be confronted with many requests of the same general character; and granting the X–20 proposal, we would have no fair or rational basis for denying similar such requests."
>
> 2. "Likewise, the authorization of this and like proposals would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs[3]

---

[1] 21 F.P.C. at 141.

[2] The Commission noted in its order that a minor portion of the rate structure, dealing with the rate for the transportation of the "displaced" gas had not, in its opinion, been substantiated on the record. 21 F.P.C. at 141 n. 3. The petitioners dispute this finding. However, all concerned agree "that the Commission did not rely upon that deficiency as a ground for denying the certificate. Had the Commission otherwise been able to grant the certificate, it would presumably have remedied the defect by a condition." Brief for the FPC, p. 5 n. 10.

[3] In its Order Denying Application for Rehearing, the Commission stated that "of course there can be no preemption of capacity not already built; but the construction and utilization of given capacity for service of the character proposed here would reasonably lessen the likelihood of capacity being constructed for other and future service of a character more in

even though the bare authorization here sought would not of itself entirely nullify the Leidy Storage project."

3. "The impact of large demand on relatively limited supply is certain enough to raise rates and field prices if only one bidder is bringing that demand to bear on the supply. How much more serious is that impact when it is in the form of multiple bidders, each attempting to reserve to itself a firm supply. Inevitably, there would be upward pressure on rate levels in the fields. We do not believe we ought to encourage such when it is unnecessary."

4. "Large purchasers of gas, like Consolidated Edison, can readily compete with pipelines for gas purchases. * * * But the smaller purchaser may not be as fortunate. He will have to rely on the pipeline supplier. And how long the pipeline can continue to buy in competition with nonjurisdictional, large volume purchasers, or indeed, how willing it might be to undertake such less desirable service, is at least a question."

5. "These are all factors that weigh against the grant. They would confound and make more difficult a decision in such a case as this even if the gas were to be used for a demonstrably superior use. But when the purpose for which the sale would be made is something less than desirable, they take on more serious, even controlling, significance."[4]

When the basis of the controversy is understood it gets down to a point which is easily stated although difficult to answer. It is agreed by all parties that the purchase by Con Edison of the gas in Texas is not subject to the jurisdiction of the Commission. Con Edison can buy as much gas as it can pay for in Texas and

---

accordance with the requirements of public convenience and necessity." 21 F.P.C. at 402.

[4] 21 F.P.C. at 141.

there is nothing the Commission can do about it. The same is true of the use which Con Edison makes of this gas when it gets to New York. Since it is not to be the subject of re-sale in that state, the Commission has nothing to say about its use either.

Section 1(b) of the Natural Gas Act[5] sets out specifically its coverage as follows:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. 15 U.S.C.A. § 717(b).

As the presiding examiner pointed out in his opinion,[6] if Con Edison could liquefy this gas and transport it by truck or by ship to New York City there would be nothing for the Commission to take hold of. The question, therefore, comes down to the scope of the authority of the Commission given by Section 7 of the Act which provides for the certificate of convenience and necessity.[7] How far does this phrase let the Commission go?

---

[5] 15 U.S.C. § 717–717w.

[6] *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 303, 316 (1958).

[7] "No natural-gas company • • • shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience

Anyone can see that the phrase is a vague one, something like "due process of law," out of which one can get what he cares to put in. It is, obviously, the kind of a phrase where experience through the years builds up criteria which must be met in determining its content. Such experience-built criteria were what the Commission looked at when it saw that the "conventional requirements" for convenience and necessity had been met.

Our conclusion in these cases is that the Commission has gone beyond its authority in denying the certificate here. We think that what the Commission has in effect done is to assert, by its examination and disapproval of the end use to be made of this gas, a general allocation and conservation authority over the natural gas fields of the United States. Inspection of the reasons assigned by the Commission for its denial shows clearly, we think, that it disapproves of the use to be made of this gas in New York City as boiler fuel,

---

and necessity issued by the Commission authorizing such acts or operations. * * *" 15 U.S.C.A. § 717f(c).

"Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C.A. § 717f(e).

as contrasted with the use possibly to be made of it were it to be devoted, at some future time, to house heating and domestic use.

The Commission's argument to this Court talks about interstitial legislative authority to be exercised by a regulatory body. This is quite all right; we agree that the administrative process may clothe the skeleton of a statute with flesh, as the Commission argues. But the interstitial process cannot put new provisions into a statute. That general statement everybody would agree upon. The question is, has it done so here?

The Commission's brief talks about the "inadequacy of state power to reconcile conflicting state interests."[8] This bold assertion requires us to examine carefully the legislative history behind the statute.

The 1936 report of the Federal Trade Commission to the Senate, which is specifically singled out in the introductory clause of section 1(a) of the Natural Gas Act as a source of the policy of the Act,[9] is relied on by the Commission as authority for its consideration of the end use to be made of the gas in exercising its certificating jurisdiction. It cannot be disputed that the report, which runs over 600 pages, makes a brief mention of the conflict between industrial and house-

[8] Brief for the FPC, p. 40.

[9] "As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C.A. § 717(a).

hold uses.[10] But it is only a brief mention that is made; in neither its summary of findings [11] nor in its conclusions and recommendations [12] does the report make any mention of the matter. It is true that in its enumerated conclusions the report refers to "conservation." But a closer reading of that conclusion, together with the emphasis of the rest of the report, reveals that what was really being referred to was physical waste in the production aspects and the use of gas in gasoline extraction and the manufacture of carbon black.[13] In its listing of 16 specific evils in

[10] "The present transportation of natural gas in the large pipeline systems is intimately concerned with the sale of large or major portions of the gas so transported to industries of the general type outlined above. [This refers to use of gas for electric power plants, firing of large boilers and furnaces, brick kilns, steel mills, etc.] The gas industry claims that the supply to general consumers at prevailing prices is only made possible by the quantity sales to industry in direct competition with coal and oil. Whether such a situation is essential to maintain service at moderate prices is one problem, but it does not eliminate the fact that every thousand feet used to replace coal in large operations has diminished the future supply of natural gas available for the householder and other retail consumers, which may be considered the highest grade of service to which natural gas may be put." Federal Trade Commission, *Final Report to the Senate of the United States*, S. Doc. No. 92, Part 84–A, 70th Cong., 1st Sess. 125 (1936).

[11] *Id.* at 581–606.

[12] *Id.* at 607–17.

[13] "1. Conservation is the first problem that demands attention. Vast acreage is being drained and natural gas is being subjected to profligate and wanton waste and uneconomical uses. This has been estimated to amount to as much as a billion and a quarter cubic feet per day in one field. Witnesses having expert knowledge testified that this amount of *daily waste* is sufficient to supply the entire present needs of the domestic and commercial users of natural gas in the United States." *Id.* at 608 (emphasis supplied.) This is clearly referring to the waste type problems discussed earlier in the report. *Id.* at 92–101.

the industry the report refers to "a great waste of natural gas in *production*," but nowhere refers to end use problems."[14]

The sole recommendation of the report with respect to "conservation" was that the producing states enter into interstate compacts with each other[15] with accompanying "Federal legislation prohibiting the transportation in interstate or foreign commerce of natural gas *produced or released from storage* in excess of the State's quota or *produced* in violation of other State conservation laws and regulations."[16] It also recommended that a federal agency "be empowered to investigate the supply of and demand for natural gas throughout the country, to keep such information current, and to advise and recommend to State regulatory boards regarding the proper amount to be fixed by them from time to time as the several State quotas."[17] The result of this advice was the enactment of Section 11 of the Natural Gas Act which empowered the Federal Power Commission to assemble information and report to Congress with respect to interstate compacts,[18] and nothing more. Thus Congressman Mapes, a member of

[14] *Id.* at 615–16 (emphasis supplied).

[15] *Id.* at 612.

[16] *Id.* at 613 (emphasis supplied).

[17] *Ibid.*

[18] "(a) In case two or more States propose to the Congress compacts dealing with the conservation, production, transportation, or distribution of natural gas it shall be the duty of the Commission to assemble pertinent information relative to the matters covered in any such proposed compact, to make public and to report to the Congress information so obtained, together with such recommendations for further legislation as may appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the conservation of natural-gas resources within the United States and in the

the House Interstate and Foreign Commerce Committee which drafted the bill, was able to state to the House, sitting as the Committee of the Whole, that "the only provision of the bill [which was eventually enacted] which seems to look to the conservation of the natural gas resources of the country is contained in the provision relating to the State compacts."[29]

That the 1938 Act did not give the Commission power to deal with conservation considerations was well recognized by the Commission itself in its 1940 Annual Report in which it recommended a broadening of the Act to give it power to resolve conservation problems.[30]

---

orderly, equitable, and economic production, transportation, and distribution of natural gas.

"(b) It shall be the duty of the Commission to assemble and keep current pertinent information relative to the effect and operation of any compact between two or more States heretofore or hereafter approved by the Congress, to make such information public, and to report to the Congress, from time to time, the information so obtained, together with such recommendations as may appear to be appropriate or necessary to promote the purposes of such compact.

"(c) In carrying out the purposes of this chapter, the Commission shall, so far as practicable, avail itself of the services, records, reports, and information of the executive departments and other agencies of the Government, and the President may, from time to time, direct that such services and facilities be made available to the Commission." 15 U.S.C.A. § 717j.

[29] 81 Cong. Rec. 6726 (1937).

[30] A proposal "to tap the Southwestern reserves of natural gas to supply the tremendous markets available in the Northeastern States poses the country with a serious problem of energy resource conservation. The Natural Gas Act as presently drafted does not enable the Commission to treat fully the serious implications of such a problem. The question should be raised as to whether the proposed use of natural gas would not result in displacing a less valuable fuel and create hard-

The statute was amended in 1942.[21] But that the 1942 amendments did not give the Commission its requested power is also apparent. Neither the committee hearings[22] nor the committee reports[23] make any mention of the Commission's concern with respect to conservation. But even more important is the Commission's own concession of lack of such power which appears in its 1944 report to Congress;[24] this

---

ships in the industry already supplying the market, while at the same time rapidly depleting the country's natural gas resources.

"Careful study of the entire problem may lead to the conclusion that use of natural gas should be restricted by functions rather than by areas. * * * General use of natural gas under boilers for the production of steam is * * * under most circumstances of very questionable social economy.

"* * * *.

"The Commission is convinced that these conservation problems are of such preeminent importance, especially in the present world situation, that the Natural Gas Act should be immediately broadened to give the Commission adequate power to resolve them in the public interest." 20 FPC Ann. Rep. 79–80 (1940).

[21] 56 Stat. 83–84 (1942).

[22] *Hearings on H.R. 5249 Before the House Committee on Interstate and Foreign Commerce*, 77th Cong., 1st Sess. (1941).

[23] H.R. Rep. No. 1290, 77th Cong., 1st Sess. (1941); S. Rep. No. 948, 77th Cong., 2d Sess. (1942).

[24] "The Commission is keenly aware of the importance of conservation and the serious problems raised by the continued construction of large natural-gas pipe lines and the accelerated depletion of our natural-gas reserves due to war activities. In its annual report to Congress for the year 1940 the Commission discussed this question at some length. In that report a number of important questions were raised, but it would appear that further studies and investigations must be conducted before satisfactory answers to these important and difficult questions can be formulated.

"In its hearings on certificate cases, under section 7(c) of the act, as amended, the Commission has freely permitted the intervention of representatives of coal, railroad, labor, and

report followed closely on the heels of the *Hope*[25] decision on which the Commission so heavily relies.

This Court does not say that the interstate compact was, or is, the best way to handle the conservation problem. What we do say is that this is what the Congress provided.

In 1944, the same year as the Commission's report to Congress, considerations of the end use to which the gas was to be applied began to appear in the Commission's orders and opinions in certificate proceedings. Although in the initial case the Commission refused, because of the pendency of its Natural Gas Investigation, to give any weight to the contention that use of gas for boiler fuel purposes was undesirable,[26] in later cases such a contention was clearly

---

other interests concerned with the production or transportation of competing fuels. These interests have presented extensive evidence on the economic, sociological, and technological aspects of fuel competition, and their representatives have strongly urged the Commission either to deny certificates on the general grounds of conservation or to attach restrictions which would severely limit the uses for which natural gas might be sold.

"It has been the unanimous view of the Commission that, inasmuch as the Congress had not given it comprehensive powers to deal with the end uses for which natural gas is consumed, and had granted the Commission no authority to regulate rates for the direct sales of natural gas to industry, it was the duty of the Commission not to seek to exercise such authority until the Congress amended the Natural Gas Act to confer on the Commission such specific powers as Congress desired it to exercise." Federal Power Commission, *The First Five Years Under the Natural Gas Act* 15 (1944). The Commission itself thought these paragraphs important enough to quote in full in its own five-page press release on the report. See FPC Release No. 2342, January 23, 1944.

[25] *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[26] *Memphis Natural Gas Co.*, 4 F.P.C. 197 (1944), *aff'd sub nom.*, *Department of Conservation* v. *FPC*, 148 F. 2d 746 (5th

considered as a factor weighing against the granting of a certificate." Other factors weighing for or against the proposed boiler fuel use in these cases included such matters as national defense, discrimination against other industrial customers, effect on existing customers, whether the service was to be part

---

Cir.), *cert. denied*, 326 U.S. 717 (1945). The Commission also pointed out in its opinion that the application involved extension of facilities adequately to supply present customers rather than to supply new customers.

" *Northern Natural Gas Co.*, 4 F.P.C. 1099 (1945), 7 F.P.C. 296 (1948) (use as boiler fuel by a power company); *East Tennessee Natural Gas Co.*, 8 F.P.C. 836 (1949), *aff'd sub nom., National Coal Ass'n.* v. *FPC*, 191 F. 2d 462 (D.C. Cir. 1951). (use as boiler fuel by Atomic Energy Commission); *Piedmont Natural Gas Corp.*, 9 F.P.C. 629, 70, 83-90 (1950) (use as boiler fuel by a power company); *Texas Gas Transmission Corp.*, 10 F.P.C. 391 (1951) (use as boiler fuel by Tennessee Valley Authority and by a power company); *Transcontinental Gas Pipe Line Corp.*, 11 F.P.C. 605, 615 (1952) (use as boiler fuel by a power company); *Texas Gas Transmission Corp.*, 12 F.P.C. 658 (1953) (use as boiler fuel by a power company); *Mississippi River Fuel Corp.*, 12 F.P.C. 109, 114 (1953) (use as boiler fuel by a power company); *Panhandle Eastern Pipe Line Co.*, F.P.C. Opinion No. 274 (1954), *aff'd on other grounds sub nom., Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F 2d 467 (3d Cir.), *cert. denied* 352 U.S. 891 (1956) (use as boiler fuel by a paper company and three others); *Southern Natural Gas Co.*, 14 F.P.C. 243 (1955), *aff'd sub nom., Charleston & W. C. Ry.* v. *FPC*, 234 F. 2d 62 (D.C. Cir. 1956) (use as boiler fuel by power company serving three customers one of which devotes all power obtained to an Atomic Energy Commission project); *Northern Natural Gas Co.*, 15 F.P.C. 682, *rev'd* 15 F.P.C. 1634 (1956), *aff'd sub nom., National Coal Ass'n* v. *FPC*, 247 F. 2d 86 (D.C. Cir. 1957) (use as boiler fuel by a power company); *Houston Texas Gas & Oil Corp.*, 16 F.P.C. 118 (1956) (use as a boiler fuel by two Florida power companies); *Cities Service Gas Co.*, 17 F.P.C. 516 (1957) (use as boiler fuel by a power company).

time or full time, proximity of the proposed customer to coal fields, effect on the pipe line's revenues, and the relative demand for natural gas by domestic and other industrial consumers in the area to be served.

In only four of these cases was the application for a certificate actually denied, and in one of them, the certificate was eventually granted on a rehearing a few years later.[28] In another case, the customer seeking to purchase the gas for boiler fuel was eventually successful in obtaining it, although in smaller amounts, from another pipe line subject to the Commission's jurisdiction.[29] In still another instance a pipe line's application to supply gas to two customers for boiler fuel use was denied,[30] but that same pipe line was eventually granted a certificate to supply one of the two customers.[31] In the fourth case, the denial remained unchanged.[32]

---

[28] *Northern Natural Gas Co.*, 4 F.P.C. 1099 (1945), 7 F.P.C. 296 (1948).

[29] *Piedmont Natural Gas Corp.*, 9 F.P.C. 629, 70, 88–90 (1950). See *Transcontinental Gas Pipe Line Corp.*, 11 F.P.C. 605, 615 (1952).

[30] *Texas Gas Transmission Corp.*, 10 F.P.C. 391 (1951) (Mississippi Power & Light Co. and Tennessee Valley Authority).

[31] *Texas Gas Transmission Corp.*, 12 F.P.C. 658 (1953) (Mississippi Power & Light Co.).

[32] *Panhandle Eastern Pipe Line Co.*, F.P.C. Opinion No. 274 (1954), *aff'd on other grounds, sub nom., Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F. 2d 467 (3d Cir.), *cert. denied* 352 U.S. 891 (1956). Certificates were granted for service to three industrial companies and were denied for service to a fourth, a paper company. The latter had complained about fly ash trouble but the Commission concluded that the evidence therein indicated that the problem could be abated without resort to natural gas as boiler fuel.

All of these cases are quite distinguishable from the facts presented in the New York situation before us."[33]

We have no decided court case to give us a precedent or guidance in the matter here under discussion. Counsel for the Commission so stated and we think accurately.

In *Department of Conservation* v. *FPC*, 148 F. 2d 746 (5th Cir.), *cert. denied* 326 U.S. 717 (1945), Memphis Natural Gas Company had been granted a certificate of public convenience and necessity. The Louisiana Department of Conservation petitioned the court for an order vacating the Commission's action, contending that the application should have been denied because the gas was to be used for boiler fuel, an "inferior" use. The court in upholding the Commission's action stated: "*Assuming, without deciding,* that the commission could properly consider as one of the facts entering into the granting or denial of the certificates the uses to which the gas was to be put, that is, that considerations of conservation had a place in such granting or refusal, we think it quite plain that the statute does not make such matters determinative."[34]

In *National Coal Ass'n* v. *FPC*, 191 F. 2d 462 (D.C. Cir. 1951), East Tennessee Natural Gas Company had been granted a certificate of public convenience and necessity. This time it was the coal and railroad interests who asked for a vacating order on the ground that the Commission had not considered the

[33] We do not think that any of these cases are sufficiently significant to require detailed analysis. If the Commission has authority to regulate end use as part of a conservation plan it certainly has the authority to balance the factors in each individual case as it arises.

[34] 148 F. 2d at 749–50 (emphasis supplied).

effect of the issuance of the certificate on competing fuels and transportation and had not considered the relation of the project to conservation of natural gas. Judge Bazelon, for Judge Fahy and himself, in upholding the action of the Commission stated: "Although considerations such as those suggested by petitioners *may well* be part of the complex out of which the Commission's judgment as to 'public convenience and necessity' arises, they are nowhere made standards governing the issuance or denial of certificates."[35]

In *Charleston & W. C. Ry.* v. *FPC*, 234 F. 2d 62 (D.C. Cir. 1956), Southern Natural Gas Company had been granted a certificate of public convenience and necessity. The coal and railroad interests petitioned for a vacating order. Two commissioners had dissented from the order below on conservation grounds. The court in affirming the Commission's order stated: "Had the decision initially been for us we might have reached a different conclusion, on the ground of the dissent or on other grounds. But the judgment of the Commission was within its legal competence."[36]

It is apparent that none of these three cases is helpful here. Each dealt with a situation where a certificate had been granted by the Commission; the court's only concern in each was whether the Commission had failed to consider a matter of controlling significance. To say that considerations of conservation are not controlling does not aid in deciding whether or not such matters may be considered at all. In none of these cases is there any indication of a search of the legislative history to determine whether the Commission had the authority to employ

[35] 191 F. 2d at 467 (emphasis supplied).

[36] 234 F. 2d at 64.

such considerations in dealing with applications for certificates; obviously there was no need to make such a search. Finally, it should be mentioned that, in all three cases, the pipe line company involved was both selling and transporting the gas. That is not true here.

Nor does the Supreme Court decision in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), shed any more light on the matter. Although in that case, a rate-making proceeding, the State of West Virginia argued that the Commission should have considered, among other things, the effect of its rate order on conservation of West Virginia's natural gas supplies, Mr. Justice Douglas, speaking for the majority, stated: "We have searched the legislative history of the Natural Gas Act for any indication that Congress entrusted to the Commission the various considerations which West Virginia has advanced here. And our conclusion is that Congress did not."[37] On the other hand, he did go on to say that "when it comes to cases of abandonment or of extensions of facilities or service, *we may assume* that, apart from the express exemptions contained in § 7, considerations of conservation are material to the issuance of certificates of public convenience and necessity. But the Commission was not asked here for a certificate of public convenience and necessity under § 7 for any proposed construction or extension."[38] Thus this rate case has been used as authority by both sides in the present proceedings. It may be granted that the dissenting opinion of Mr. Justice Jackson goes far in stating reasons of public policy for a strong conservation program by way of husbanding our natural gas resources. But that does not put anything new into the statute.

[37] 320 U.S. at 609.

[38] *Id.* at 612 (emphasis supplied).

The Commission, during the fifties, has recommended to Congress that it be given increased authority in allocation of natural gas supplies. From 1951 through 1953, the Commission requested that the Act be amended "to provide specifically for control by the Commission of the end-use of natural gas when required for national defense or to safeguard the available supply." [39] In 1954 and later years that request was tempered somewhat to a request "to provide specifically for control by the Commission of the allocation of natural gas when required for national defense or to safeguard the available supply in emergency situations." [40] So far these recommendations have not been adopted. Whether they should be, or whether they should not be, and what the arguments are for each position has no bearing on our job in these cases. What we are sure of is that interstitial administrative action cannot be substituted for asked-for legislation if that legislation is not forthcoming.

Some of the argument made on behalf of Transco goes pretty far and it is worth taking the space to point out that we are not agreeing with it. It is said that the Commission can only go on what is in the record before it. That statement is too broad. Fact conclusions, of course, must be supported by testimony, but considerations of policy are open to commissions as well as to courts. A commission may call upon its administrative experience just as a court calls upon its judicial experience. But each, it may be added, must stay within the limits of its authority.

[39] 31 FPC Ann. Rep. 145 (1951); 32 FPC Ann. Rep. 152 (1952); 33 FPC Ann. Rep. 154 (1953).

[40] 34 FPC Ann. Rep. 170 (1954); 35 FPC Ann. Rep. 182 (1955); 36 FPC Ann. Rep. 18 (1956); 37 FPC Ann. Rep. 24 (1957); 38 FPC Ann. Rep. 16 (1958).

Let us now turn to the reasons given by the Commission for its denial of this certificate.

The first one was to the effect that if the requested certificate was granted the Commission would be confronted with many requests of the same general character; if this particular one was approved it would have no "fair or rational basis for denying similar such requests."

This reason is not open to the criticism that there were no facts to prove it. It is open to the criticism, however, that it is a denial of the discriminatory process which any judicial body must exercise. If the Commission has authority to act on a matter at all, it must, just as a court must, make its choice and pick out what it deems the most important determinative factors. Reason one, therefore, we think a denial of the very thing that a Commission acting semi-judicially must do.

The second reason given is that the authorization of this and similar proposals "would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs * * *." If this is not a frank expression of an assertion of authority for general conservation, we do not see how one could be expressed. We do not see any significant change in the opinion on denial of rehearing, quoted earlier. If what is said above in this opinion is correct, this reason is obviously a bad reason.

Transco makes another point in connection with this ground which we think has substance to it. The Commission talks of preemption of facilities. Transco says the Commission should have had evidence on preemption of facilities before it made such a statement. Transco argued orally to the Court

that its own depreciation situation is such that it must keep on expanding facilities. Business-wise and depreciation-wise, it says, it is to its advantage to do so and for the Commission to talk about "preemption" without giving Transco a chance to demonstrate the truth of its argument is not fair administrative procedure.

Reason three is likewise an implicit assertion of the authority to conserve and allocate natural gas resources. The Commission points out that the impact of large demand on limited supply of gas is certain to raise rates even if only one bidder is bringing demand to bear on the supply. If more bidders come into the field the tendency will be increased to raise prices. In other words, the Commission wishes to discourage such bids as Con Edison made and is going to discourage them by not giving a certificate to get the gas out of the field where it has been purchased. Here again is an implicit assertion of authority to conserve and allocate supplies.

The fourth factor or policy consideration is a bit different. This points out that while Con Edison can compete with pipe lines for gas purchases, small purchasers will not be so fortunate. And then it expresses the possibility that a pipe line may not be able or willing to continue to buy in competition with individual large purchasers. In other words, only pipe lines should purchase gas for only they engage in interstate transportation and thereby come under authority of the Commission. This puts a consideration into the statute which the Congress did not envisage. See § 1(b) of the Act.

Ending up, the Commission says that these factors would weigh against the grant even if the "gas were to be used for a demonstrably superior use." It then

says, in effect, that the purpose for which these sales would be made is something less than desirable.

There was plenty of evidence in these cases from the City of New York and Con Edison that Con Edison was confronted with a very difficult problem. There was testimony that the fly ash discharge from the boilers in question at this Waterside plant was 15,000 pounds a day and the sulfur dioxide discharge 42,000 pounds daily. There was testimony that the substitution of gas to fire these two boilers in this populous section of the City would eliminate both the sulfur dioxide and the fly ash. To us it does not seem important that elimination of the smoke from these two boilers would not solve all the air pollution problems of the City of New York. There was reliable testimony that the situation would be helped, especially in the area of the United Nations Building and Tudor City.

Of course the weighing of factors of this kind, if within the jurisdiction of a body, is a matter in which a reviewing tribunal will not interfere if a rational conclusion has been reached.

More serious, however, is the assumption which the Commission makes that the proposed use was "inferior." It is true that the gas, under the agreement, was not to be sold and it was established that it was to be used to fire boilers. But these boilers, according to the evidence, generate power for electricity and make steam for heating. We do not see that using gas to make steam to heat an apartment house is inferior to the use of gas to heat a single family residence whether by steam, hot water or whatnot. The cases the Commission had here were not those of the use of gas for industrial purposes only. There was involved also the use of gas in a step for space heating and

lighting. That factor was completely ignored by the Commission so far as its opinion reveals.

The conclusion of the Court is that this order must be set aside and the cases returned to the Commission with directions to issue the certificate applied for, subject to further hearing on the minor question of rates described in footnote (2).

In the United States Court of Appeals for the Third Circuit

Nos. 12908, 12929, and 12930

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER IN No. 12908

THE CITY OF NEW YORK, PETITIONER IN No. 12929

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER IN No. 12930

v.

FEDERAL POWER COMMISSION, RESPONDENT

NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA, FUELS RESEARCH COUNCIL, INC., SOUTHERN CALIFORNIA GAS COMPANY, SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, INTERVENORS

Present: GOODRICH, STALEY and HASTIE, *Circuit Judges*

Judgment

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of Janu-

ary 30, 1959 of the Federal Power Commission be, and the same is hereby set aside, and the cause remanded to the Commission with directions to issue the certificate applied for, subject to further hearing on the minor question of rates described in footnote (2) of the opinion of this Court.

Attest:

IDA O. CRESKOFF, *Clerk.*

NOVEMBER 3, 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1960